

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-219664.3

DATE: May 13, 1986

MATTER OF: Dynalectron Corporation--
Request for Reconsideration

DIGEST:

1. GAO's Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) (1985), require that an initial protest set forth a detailed statement of the legal and factual protest grounds and do not contemplate a piecemeal presentation of arguments or information even where they relate to the original grounds for protest. Where, however, the initial protest called into question the accuracy of all the workload estimates in a solicitation and the agency possessed sufficient information to take comprehensive corrective action or otherwise to fully respond to the protest, then a subsequently submitted specific enumeration of defective estimates is timely.
2. Protest by incumbent contractor that workload estimates in solicitation are defective because they differ from the current workload is denied where protester fails to show that the estimates are not based on the best information available concerning the agency's anticipated future requirements, otherwise misrepresent the agency's needs, or result from fraud or bad faith.
3. General allegation that multiple dissimilar tasks should not have been consolidated under single work category for purposes of calculating payment deduction is untimely to the extent the protester failed to identify in its initial protest the specific work categories to which its general allegation applied, since such a determination depends on subjective criteria not defined by the protester and the contracting agency therefore could not reasonably determine which

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work categories, in the protester's view, were covered by the general allegation.

Dynalelectron Corporation (Dynalelectron) requests reconsideration of our decision in Dynalelectron Corp., B-219664, Dec. 6, 1985, 65 Comp. Gen. ___, 85-2 CPD ¶ 634. In that decision, we denied Dynalelectron's protest against the terms and conditions of request for proposals (RFP) No. DAVA01-85-R-0001, issued by the Defense Audiovisual Agency (DAVA) for the procurement of audiovisual services. We affirm our prior decision.

The solicitation requested proposals for supplying audiovisual services at a firm, fixed price and for undertaking audiovisual productions on an indefinite-quantity basis, for a 9-month base period and 4 option years, in connection with DAVA's operations at Norton Air Force Base in California. The Air Force assumed the functions of DAVA after September 30, 1985.

Under the audiovisual services portion of the solicitation, offerors were provided with estimates of DAVA's requirements for a number of audiovisual services ("Required Services" or "RS") and were required to propose a total price for providing all these services during each of the base and option periods.

Accuracy of Workload Estimates

In its initial protest of August 9, 1985, Dynalelectron, then the incumbent contractor, alleged that the solicitation's workload estimates for the audiovisual services were erroneous and misleading because they differed substantially from the government's actual requirements. Dynalelectron identified 20 RS for which the current, actual workloads under DAVA's contract with Dynalelectron exceeded the estimated workloads set forth in this solicitation by at least 100 percent. In addition, Dynalelectron generally alleged that the estimates for approximately 40 other unidentified RS were overstated by at least 50 percent and that the estimates for approximately two-thirds of the RS differed significantly from the current workload.

In the administrative report responding to the protest, DAVA conceded that figures for the actual workload experienced under the current contract were not considered in deriving the estimates in the solicitation. Rather, these estimates were based upon the estimates contained in the prior solicitation which resulted in the current

contract. This was done to facilitate a comparison of the advantages of accepting an offer for a new contract with the government's option of extending the current contract. Nevertheless, DAVA indicated that it would amend the solicitation to include revised workload estimates which took into account the actual workload experience under Dynalelectron's current contract.

Shortly thereafter, DAVA amended the solicitation to revise not only the estimates for all except one of the 20 specific RS which Dynalelectron had identified in its initial protest, but also the estimates for a number of other RS. Approximately 30 percent of all the workload estimates were revised. DAVA described the revised estimates as the "fruit of the Government's best judgment based on the most current data," indicating that both actual workload figures through July 1985 and projections of the future workload after the Department of the Air Force takes over the functions of DAVA were considered.

Dynalelectron conceded in its subsequent comments of September 30 that the corrections to the workload estimates for six of the 20 RS originally identified as defective appeared to reflect actual experience. The protester contended, however, that for the other estimates, the corrections were "erratic to non-existent." In addition, Dynalelectron provided what it alleged to be the actual 1984 and 1985 workloads for all the RS and identified additional RS' for which the workload estimates in the solicitation were allegedly defective.

DAVA thereupon amended the solicitation to revise an additional 20 percent of the workload estimates.

In our prior decision, we held that Dynalelectron had failed to meet its burden of proving that the workload estimates for the 20 RS identified in Dynalelectron's original protest, as revised by DAVA, were not based on the best information available as to the agency's anticipated future requirements, otherwise misrepresented the agency's needs, or resulted from fraud or bad faith. Cf. D.D.S. Pac, B-216286, Apr. 12, 1985, 85-1 CPD ¶ 418. In addition, we found untimely Dynalelectron's allegations regarding the additional RS first identified as defective in Dynalelectron's September 30 comments. Notwithstanding the general allegation in Dynalelectron's initial protest that the estimates for two-thirds of the RS differed from the current workload, we concluded that Dynalelectron could and should have identified all the allegedly defective estimates in the original protest.

Upon reconsideration, we now agree with Dynalelectron that its protest letter adequately raised the question of the propriety of the subsequently identified, additional workload estimates. Dynalelectron's initial allegations identified a general defect in the solicitation, i.e., the use of workload estimates derived from the prior solicitation which often substantially differed from the more recent historical workloads. It thereby generally called into question the basis for all the workload estimates and, in particular, called into question each workload estimate which substantially differed from the recent historical workload. Since DAVA knew the actual workload under the prior contract, it knew which workload estimates Dynalelectron considered defective. The agency therefore was in a position to take comprehensive corrective action to remedy any defective workload estimate or otherwise to respond to Dynalelectron's allegations in this regard. We therefore will consider on the merits Dynalelectron's allegations concerning the workload estimates.

In its request for reconsideration, Dynalelectron once again argues that the additional workload estimates identified in its September 30 comments are defective because they deviate from the current, actual workload under Dynalelectron's contract with DAVA. Dynalelectron does not explain why DAVA's estimates in the specific categories identified were improper, except for its initial general contention that actual workload data from prior years should be used. That argument is unpersuasive, however, since Dynalelectron has not shown a correlation between DAVA's current and future requirements. As we stated in our original decision, workload estimates represent the best estimates of the agency's anticipated future, not current, requirements. Here, Dynalelectron has presented no evidence to show that DAVA's future requirements will be the same as its requirements under the contracts with Dynalelectron for 1984 and 1985. On the contrary, it is reasonable to assume that the requirements will be different since the actual workload figures themselves show significant fluctuations in the character and quantity of work year to year; a new agency with potentially different priorities is assuming responsibility for DAVA's functions; and a contract under the RFP at issue could be extended by the exercise of options to a period of nearly 5 years.

Consistent with the requirement to formulate the workload estimates based on its future requirements, DAVA has revised the estimates twice in response to the protest. The revisions were based on both the actual workload figures through July 1985 and projections of the future

workload after the Air Force takes over the functions of DAVA. Since Dynalelectron has presented no evidence to show that these workload estimates were not based on the best information available as to DAVA's future requirements or otherwise result from fraud or bad faith, we find that Dynalelectron has failed to show that the workload estimates are defective.

Propriety of Deductions for Defective Performance

In its original protest, Dynalelectron also challenged the solicitation provisions relating to payment deductions for defective performance. Dynalelectron maintained that the payment deductions set forth in the RFP had been fixed without reference to the probable actual damages that would be suffered as a result of defective performance and, therefore, that they constituted an unenforceable penalty.

In its initial protest of August 9, Dynalelectron alleged that the RFP permitted deduction of an amount representing the value of several different tasks where an inspection revealed a defect in only one type of task, citing RS-48 as "an example." Although the solicitation included separate workload estimates for 10 different tasks under RS-48 (including providing presentation charts, briefing charts, blue line/black line prints, plaques, photoplates, nameplates, posters, displays, certificates and lobby displays), the RFP only provided for a single entry for these services, "[p]roduce quality Graphic Art work," a single deduction category based upon the defective percentage in the sample of any particular lot, and a single maximum payment percentage of RS value.

In response to the initial protest, DAVA issued amendment No. 6 to the RFP which in part separated RS-48 for graphic art services into 10 distinct subtasks. DAVA maintained, however, that a further breakout of tasks under other RS was inappropriate.

In our prior decision, we held that the breakout of work under RS-48 into 10 separate deduction categories as requested by Dynalelectron rendered its initial protest in that regard academic. Although we recognized that Dynalelectron, in its September 30 comments, identified additional, specific RS which allegedly contained dissimilar tasks, we pointed out that these were apparent prior to the August 9 closing date. Since solicitation improprieties apparent prior to the closing date must be protested prior to closing, 4 C.F.R. § 21.1(a)(1) (1985), and our Bid Protest Regulations do not contemplate a

piecemeal presentation or development of protest issues, we considered the allegation as to the additional RS to be untimely.

In its request for reconsideration, Dynalelectron challenges our finding that its allegations concerning the additional payment deduction categories identified in its September 30 comments were untimely. The protester argues that it clearly identified the relevant problems with the payment deduction categories in its initial protest and contends that a review of the information available to the agency would have revealed all the allegedly defective categories. Dynalelectron considers the additional payment deduction categories identified in its September 30 comments merely to be additional support for its previous, timely filed grounds of protest.

The crux of Dynalelectron's argument is that its general allegation--that it was improper to consolidate dissimilar tasks under one RS category for purposes of calculating the payment deduction--was sufficient to identify the specific RS which Dynalelectron regarded as defective. We disagree. In its initial protest, Dynalelectron stated that RS-48 was defective because it combined 10 "completely separate and independent tasks" under one category. As Dynalelectron framed the issue, therefore, the key determination is which categories involve "completely separate and independent" tasks.

In none of its submissions, however, including the request for reconsideration, has Dynalelectron defined what in its view constitutes "completely separate and independent" tasks. Without any such indication from Dynalelectron, DAVA could not reasonably determine which specific RS were allegedly defective, since such a determination depends on Dynalelectron's own judgment as to what constitutes separate and independent tasks. Since Dynalelectron's general allegation thus was based on subjective, not objective, criteria--i.e., does any particular RS involve "completely separate and independent" tasks as defined by Dynalelectron?--it was incumbent on Dynalelectron to identify the specific RS to which its general allegation applied.^{1/}

^{1/} This is the key distinction between Dynalelectron's allegation regarding the workload estimates, discussed above, and its allegation concerning the payment deductions. Unlike the payment deduction allegation, the workload estimate allegation put DAVA on notice of the objective criteria on which it was based and which could be applied to determine the specific workload estimates covered by the general allegation.

In its request for reconsideration, Dynalelectron has recast and in effect broadened its initial allegation. Instead of categories involving "completely separate and independent" tasks, Dynalelectron now states that "[a]ny Required Service which was comprised of multiple tasks with only one payment deduction percentage falls under the category of deficiency identified in the protest." (Emphasis added.) Dynalelectron concludes that simply examining each RS thus would produce a list of allegedly defective RS identical to the list furnished by Dynalelectron in its comments on the agency report. We disagree. A review of the RS reveals several which are not included in Dynalelectron's list even though they involve "multiple tasks" and thus fit Dynalelectron's definition of allegedly defective RS in its request for reconsideration. For example:

- (1) RS-52 - Design and prepare artwork for publication. Defined in sec. C-5, ¶ 5.2.9.2.6: "The contractor shall design and construct materials for publication and prepare camera-ready artwork for the printer."
- (2) RS-54 - Provide training aids. Defined in sec. C-5, ¶ 5.2.9.2.8: "The contractor shall design and construct training aids, and two/three dimensional training aid display items."
- (3) RS-58 - Black and white copy photography. Defined in sec. C-5, ¶ 5.2.9.3.4: "Black and white negatives shall be produced from art work, publications, displays, pictures, charts, etc., in a variety of sizes ranging from 35mm to 8 x 10 inch. Both continuous tone negatives and high contrast line copy negatives will be required."

Thus, even applying Dynalelectron's most recent description of the RS covered by its general allegation does not yield the same list of RS as identified by Dynalelectron. In our view, this confirms our conclusion that DAVA could not reasonably be expected to respond to Dynalelectron's general allegation without an enumeration of specific RS regarded as defective by Dynalelectron. Since Dynalelectron chose not to identify the specific RS involved until its comments on

the agency report,^{2/} we affirm our original finding that Dynalectron's protest was untimely with regard to those specific RS.

Our prior decision is affirmed.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel

^{2/} In its comments on the report, Dynalectron stated that it had identified 13 RS as defective in its initial protest. This is inaccurate. As noted above, the initial protest did no more than identify one RS, RS-48, as an example of the alleged defect.